Salinas, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

UNITED FARM WORKERS OF AMERICA, AFL-CIO, Respondent, and CERVANDO PEREZ, Charging Party.	)	Case No. 78-CL-21-M(2) 11 ALRB No. 33

BACKPAY DECISION AND ORDER

On November 28, 1984, Administrative Law Judge (ALJ) Robert LeProhn issued the attached Supplemental Decision in this case.[1] Thereafter, Respondent UFW timely filed exceptions to the ALJ's Decision with a supporting brief.

////////////////

[1] Cervando Perez was one of eleven agricultural employees who filed an unfair labor practice charge against their union, the United Farm Workers of America, AFL-CIO (UFW or Union), accusing the Union of illegally terminating their good standing for failure to pay a day of holiday pay into the UFW's Citizen's Participation Day (CPD) fund. Perez was the only one of the Charging Parties who was actually discharged by his employer as a result of his loss of good standing with the Union. In May of 1982 the UFW and General Counsel signed a settlement agreement providing for (1) an internal union rebate procedure for members who objected to the CPD payments, see UFW (Giles Breaux (1985) 11 ALRB No. 32,(2) reinstatement of all Charging Parties to good standing with the Union, (3) union-paid backpay for Cervando Perez and union efforts to have Perez reinstated with his employer. Perez was the only Charging Party who did not go on to challenge the settlement in court, electing instead to pursue his reinstatement and backpay rights under the settlement. Although the UFW argued, in effect, that the pending court challenge to the settlement agreement divested the Board of jurisdiction to hear Perez' backpay claim, the ALJ properly found that the settlement was final as to Perez since he had declined to seek review of the Board's Order.

Pursuant to the provisions of Labor Code section 1146,[2/] the Agricultural Labor Relations Board (ALRB or Board) has delegated its authority in this matter to a three-member panel.[3/]

The Board has considered the record and the ALJ's Decision in light of Respondent's exceptions and brief and has decided to affirm his rulings, findings of fact and conclusions of law and to adopt his recommended order with two modifications: (1) interest shall be computed in accordance with the Board's Decision and Order in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55 from August 18, 1982, the date of issuance of Lu-Ette, rather than from the date of issuance of this Supplemental Decision and Order; (2) work search expenses for 1980, apparently inadvertantly included by the ALJ, should be deducted from the award.[4/] The deduction reduces the award by $65.00, for a total of $10,646.10 plus interest.

[2/] All section references are to the California Labor Code unless otherwise specified.

[3/] The signatures of Board members in all Board Decisions appear with the signature of the Chairperson first (if participating), followed by the signatures of the participating Board members in order of their seniority.

[4/] We deny Respondent's motion, made to the Board and not to the ALJ, to take administrative notice of two strike access cases, Bruce Church, 'Inc. (1981) 7 ALRB No. 20 and Growers Exchange, Inc. (1982) 8 ALRB No. 7, as well as court orders obtained by the Board granting strike access to several Salinas area companies during the 1979 strike. The UFW also asked us to take administrative notice of several other Board Decisions as further evidence of the extent of the strike and the use of replacement workers. The major premise underlying the UFW's argument, however, is that Perez[1] duty to mitigate damages includes a duty to work at struck ranches. The ALJ properly rejected such a proposition, citing Big Three Industrial Gas (1982) 263 NLRB 1189 [111 LRRM 1616].

ORDER

Pursuant to Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders Respondent United Farm Workers of America, AFL-CIO, to pay Cervando Perez $10,646.10 plus interest at the rate of 7 percent per annum until August 18, 1982, the date of issuance of Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55 (Lu-Ette), and thereafter interest to be computed in accordance with the Board's Decision and Order in Lu-Ette.

Dated: December 19, 1985

JYRL JAMES-MASSENGALE, Chairperson

JEROME R. WALDIE, Member

JORGE CARRILLO, Member

CASE SUMMARY

UNITED FARM WORKERS OF AMERICA, AFL-CIO (CERVANDO PEREZ)

11 ALRB No. 33
Case No. 78-CL-21-M(2)

Settlement

The Charging Party to be made whole in this backpay proceeding was one of 11 UFW members whose good standing was terminated in 1978 for failure to pay to the Union the Citizen's Participation Day (CPD) holiday pay negotiated in the collective bargaining agreements between the UFW and the members' employers. Unlike other members, however, Perez' loss of good standing also lead to his discharge under the contract union security provision. In 1982, the General Counsel and UFW entered into a settlement which provided, inter alia., that Perez be reinstated and made whole for lost wages resulting from the discharge. Over the UFW's objection that the settlement was not final due to a pending court challenge and remand to the Board, see UFW (Giles Breaux) (1985) 11 ALRB No. 32, the case proceeded to hearing to determine the amount of backpay due Perez.

ALJ Decision

Prior to hearing, an ALJ had granted, without prejudice, the General Counsel's Motion to Strike portions of the Respondent's Answer denying the amount of gross earnings set forth in the specification. When the Respondent failed to amend its answer, the ALJ who conducted the hearing granted the General Counsel's motion that the gross earnings set forth in the specification be deemed true. In consideration of Respondent's affirmative defenses that Perez failed to make a reasonable search for employment, the ALJ found that the Respondent met its burden with respect to the 1980 season only. The ALJ cited Perez' own admission that he did not seek work in 1980 because he "knew he would be reinstated," noting that Perez offered no explanation for his expectation. The ALJ credited Perez' testimony regarding work search in 1978 and 1979 and rejected the Respondent's argument that Perez was obligated to seek work with struck growers during the 1979 lettuce strike.

The ALJ recommended the UFW be ordered to pay Perez $10,711.10 plus interest at 7 percent until the date of issuance of the Supplemental Decision and Order, and thereafter at the rate designated in Lu-Ette Farms, Inc. (1982) 8 ALRB No. 55.

Board Decision

The Board affirmed the ALJ's rulings, findings of fact, and conclusions of law but modified his Recommended Order to (1) compute interest in accordance with Lu-Ette Farms, Inc. (1982)

8 ALRB No. 55 from August 18, 1982 rather than from the date of issuance of the Supplemental Decision and Order; and (2) deduct work search expenses for 1980.

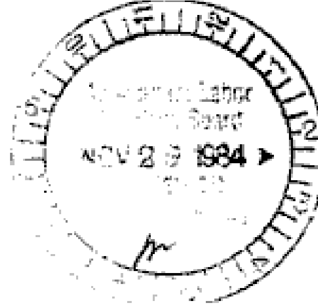
* * *

This Case Summary is furnished for information only and is not an official statement of the case, or of the ALRB.

* * *

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:	)	Case No. 78-CL-21-M
	)	
UNITED FARM WORKERS WORKERS OF AMERICA, AFL-CIO,	)	
Respondent,	)	
and	)	
CERVANDO PEREZ,	)	
Charging Party.	)	



Appearances:

Norman K. Sato
ALRB Salinas Regional Office
112 Boronda Road
Salinas, California 93907
for General Counsel

Chris Schneider
United Farm Workers of America, AFL-CIO
P. O. Box 1940
Calexico, California 92231
for Respondent

William R. Danser
Littler, Mendelson, Fastiff & Tichy
111 Almaden Boulevard, Suite 400
San Jose, California 95113

Before: Robert LeProhn
Administrative Law Judge

DECISION OF THE ADMINISTRATIVE LAW JUDGE

ROBERT LE PROHN, Administrative Law Judge:

This case was heard before me in Salinas, California, on July 31, 1984.

Following the filing of unfair labor practice charges by a number of individuals, receipt of which is acknowledged, a consolidated complaint issued on April 16, 1979. In May 1982, Respondent and General Counsel entered into a unilateral settlement agreement, denoted Stipulated Agreement.

On June 14, 1982, the Executive Secretary for the Agricultural Labor Relations Board (Board) issued an order by direction of the Board that all parties were ordered to comply with the provisions of the Settlement Agreement. The Agreement contains an affirmative provision directing the UFW to make Cervando Perez whole for wages lost for the period July 26, 1978, to November 10, 1980, the stipulated period during which Perez was off work at West Coast Farms as a result of his termination at the insistence of the UFW. Perez received an unconditional offer of reinstatement effective November 10, 1980.

Although there is nothing in the record before me so indicating, it appears that charging parties other than Perez filed a Petition for Review of the Board's order approving the settlement agreement. It also appears, again without any documentary evidence in the record so establishing, that the Board's order was remanded for further consideration in light of the Supreme Court's decision in what UFW counsel referred to as the Ellis case.[1/]

---

1. Neither case name nor case citation was provided. Apparently the reference was to Ellis v. Railway Clerks (1984)

______U.S._____; 116 LRRM 2001.

Respondent relied upon the remand to argue there was no final Board order in the instant matter and, thus, no jurisdiction to proceed with the compliance hearing. Counsel for charging party pointed out that Perez had not sought review of the Board's order and that the order was final as to him. Therefore, it was appropriate to proceed. His representation regarding Perez was not challenged. Absent Perez having sought review of the Board's Order, Respondent's motion to stay the proceedings was denied.[2/]

A backpay specification in the above-captioned matter issued April 30, 1984. On May 14, 1984, Respondent filed its answer. Paragraph 5 of the specification set forth the manner in which gross wages had been calculated. Respondent's answer denied that any backpay was due Perez; that Perez would have had the gross earnings alleged; that Perez would have worked the dates set forth in the specification; that the formula for calculating gross earnings used by the Regional Director had any basis in "fact, reason or law"; the answer also denied the specification of Perez' interim earnings.

On June 7, 1984, Administrative Law Judge Sobel granted without prejudice General Counsel's motion to strike "so much of Respondent's answer relating to its denials of the amount of gross earnings set by General Counsel to be due claimant". The motion rested on Cal. Admin. Code tit. 8, section 20290(d)(2). Judge Sobel

---

2. It is not clear whether Respondent's motion was aimed at staying or dismissing the proceedings. I treated it as a motion to stay.

granted General Counsel's motion:

> . . . without prejudice to Respondent to file an appropriate answer or an appropriate explanation for its failure to file such answer by June 15, 1984. Failure to file such answer or explanation will mean that General Counsel's allegations relating to gross wages contained in Paragraphs 5 and 7 of the complaint will be deemed true.

In his Prehearing Conference Order of June 14, 1984, Administrative Law Judge Schoorl ordered Respondent to comply with Judge Sobel's order. Respondent has failed to do so. At the outset of the instant proceeding, General Counsel moved that the gross earnings set forth in the backpay specification be deemed true. The motion was granted over the opposition of Respondent.

The parties were given full opportunity to participate in the hearing. General Counsel and Respondent filed post hearing briefs. Upon the entire record, including my observation of the demeanor of Mr. Perez, I make the following:

FINDINGS OF FACT

1. The parties agree that the period of Respondent's liability for backpay due Perez is from August 10, 1978, to November 10, 1980.

2. Prior to his discharge by West Coast, Perez was employed as a lettuce loader.

3. AS calculated by General Counsel the gross backpay due Perez is $23,740.87, an amount which includes $183.00 as reasonable expenses incurred in seeking work.

4. As determined by General Counsel, Perez had interim earnings in the amount of $264.00. Thus, as calculated by General Counsel, the net backpay due Perez is $23,476.87.

5. Perez sought work as a lettuce loader beginning the

week following his discharge in August 1978. C & B, Bud Antle, and Shuman were among the growers whom Perez contacted. In each instance he was told by the foreman that the crews were full.

For approximately three weeks in October 1978, Perez worked for a bar owner friend of his in Watsonville, California. Perez cleaned tables and helped gather bottles. He received an average of $40.00 per week working for Martinez. These amounts have been treated in General Counsel's backpay specification as interim earnings during the 1978 lettuce season.[3/]

6. At the outset of the 1979 Salinas lettuce season, Perez sought piece rate work at C & B, Bud Antle and Shuman. He approached these growers because none has a contract with the UFW. He also sought work at El Toro, Bruce Church and at other lettuce growers. He was not hired. Uniformly, Perez was told by the foreman that there were seniority people who had not yet been called back. Perez sought work everywhere he saw a crew in the field and at all the lettuce growers of which he was aware. In May 1979, Perez also sought work from lettuce growers in the Watsonville area.

General Counsel's backpay specification for the week ending July 4, 1979, shows interim earnings based upon West Coast's records in the amount of $129 at West Coast Farms packing shed in Watsonville. Interim earnings for that week are inconsistent with Perez' testimony that he sought no work at the West Coast Farms packing shed after the 1978 apple season. Perez is not credited on

---

3. From Perez' testimony it appears that there were additional weeks during which he worked for Martinez; however, these weeks were outside the lettuce season and during weeks for which no backpay is claimed.

this point. Perez also testified that after being out of work for approximately 3 weeks in 1978, he learned that West Coast operated a non-union apple department. Perez testified he sought and received work moving apples. He worked one week for approximately 30 hours at a rate of $3.35 an hour. Perez[1] gross earnings for 1978 will be reduced in the amount of $100.50. Since his gross earnings for each of the first 10 weeks following his discharge were in excess of $100.50, it is unnecessary to assign the earnings to a particular week. It will suffice to subtract the amount from gross 1978 earnings.

7. Perez quit his job in the packing shed after working one week although he admits there was a month-and-a-half to two months work left and that he could have finished the season had he desired to do so. He did not seek work in West Coast's apple operation during 1980.

8. Prior to his discharge, Perez worked piece rate and earned between $16.00 and $18.00 per hour.

9. Perez goes to Mexico during December and January each winter. In 1980 he returned from Mexico in March and admittedly did not seek any work thereafter because he "knew" he would go back to his work at West Coast. The lettuce season was over before he was offered reinstatement.

10. The net backpay claimed by General Counsel for the 1980 lettuce season, the week ending May 3, 1980, through the week ending October 24, 1980, is $12,665.27, $2,137.05 of which represents retroactive pay for the 1980 season.

ANALYSIS AND CONCLUSIONS

In a backpay proceeding, General Counsel has the initial burden of proving through its backpay specification the amount claimed to be due a discriminates. In the instant case, General Counsel met its burden by having submitted a backpay specification the elements of which have been deemed true. Once the backpay specification has been proved, the burden shifts to Respondent to prove any affirmative defense available.[4/]

"It is well established that willful loss of earnings is an affirmative defense, and the burden has been described by the Court of Appeals for the Eighth Circuit as follows:

> . . . in a backpay proceeding the burden is upon the General Counsel to show the gross amount of backpay due. When that has been done, however, the burden is upon the employer to establish facts that would negative the existence of liability to a given employee or which would mitigate that liability.

It follows that the failure of a discriminatee to make a reasonable search for employment constitutes an affirmative defense. An employer must prove that losses were 'willfully incurred' and a 'clearly unjustifiable refusal to take desirable new employment.' An employee must make a diligent or reasonable search for interim work. In evaluating whether an employer has sustained his burden 'any uncertainty is resolved against the wrongdoer whose conduct made the uncertainty possible.' "[5/]

---

4. Abatti Farms, Inc. (1983) 9 ALRB No. 59; Mid-West Hanger Co. (1975) 221 NLRB 911.

5. Mid-West Hanger Co. (1975) 221 NLRB 911, 918 (citations omitted).

With respect to the 1980 Salinas-Watsonville lettuce season, Respondent established that Perez made no effort to seek interim employment. Perez goes to Mexico annually during the winter months. He admittedly made no effort to find work following his return from Mexico in March 1980 because he "knew" he would be returned to work at West Coast. Perez did not explain the basis for this expectation, and he was not unconditionally offered reinstatement until after the close of the 1980 lettuce season. The stipulated settlement agreement providing the basis for awarding Perez backpay was not entered into until May 1982. Respondent having established through the credible admission of the discriminatee that he failed to seek work during the 1980 season, it was incumbent upon General Counsel to produce evidence that Perez's admitted failure to seek work was not a willfully incurred loss of earnings or an unjustifiable failure to seek employment. Such evidence was not offered.

With respect to the 1980 season, Respondent met its burden of establishing that Perez's loss of earnings was willfully incurred and that his failure to seek work during the 1980 season was without justification. Based upon General Counsel's specification, Respondent's backpay liability for the 1980 season was $12,665.67. The backpay due the discriminatee is reduced by this amount.

Perez's candor with regard to his failure to seek work during the 1980 lettuce season lends credibility to his testimony regarding work seeking efforts during the 1978 and 1979 lettuce season.

With respect to the 1979 lettuce season, Respondent argues

that there was a significant strike of lettuce workers in the Salinas-Watsonville area and that had Perez looked for work in lettuce, he certainly could have found it at any of the struck employers. Aside from the anomaly of arguing that Perez failed to mitigate by failing to seek or obtain work behind one of its picket lines, Respondent failed to point to any authority that says that Perez's duty to mitigate required that he do so. In Big Three Industrial Gas (1982) 263 NLRB 1189, the Board adopted the findings and conclusions of the Administrative Law Judge. In a situation analogous to that which obtains here, the ALJ stated:

> If it is a part of the duty to mitigate to obtain comparable employment in and industry which pays rates similar to those paid by the wrongdoer employer, one must accept as a corollary that, when employees in the interim employing industry go on strike, it would be unreasonable to' require a discriminatee to behave differently from those of his fellow employees on the same job. The duty to mitigate has never been held to encompass a duty to engage in strike breaking. One of the risks assumed by an employer who unlawfully discharges an employee is that the employee will have to make choices about how, and under what circumstances, he will take interim employment while awaiting reinstatement by the wrongdoer.[6]

If Perez had no obligation to accept work at a struck grower, it follows that he would have no obligation to seek work at such an operation and that his failure to do so would be irrelevant.

Respondent argues further that Perez' testimony regarding his 1979 efforts to find work cannot be credited because he testified he was unaware there was a lettuce strike in the Salinas area during that year. Respondent argues: "The 1979 strike by the UFW in Salinas was big. You couldn't miss it if you tried."

---

6. Ibid, at 1206.

However, Respondent offered no evidence regarding which growers were struck, the periods during which the strike occurred, the periods during which picketing, if any, took place at various growers, or which, if any, struck growers operated with scabs. In short, Respondent did nothing beyond asserting its view that Perez is not to be believed because he didn't know whether there was a UFW strike in the Salinas area in 1979.[7/]

Perez was aware of lettuce strikes in the Watsonville area during 1979, and it seems unlikely that he would not have been aware of strike situations in the Salinas area. However, even if his testimony to the contrary is not credited, it does not follow that the balance of his testimony regarding work efforts should also be discredited.[8/] Perez was a believable witness. He testified that he looked primarily at non-union operations because the others didn't want him. This has the ring of truth. Responses which he says he received from foremen at various growers also make sense irrespective of whether what they told him was true, i.e., whether

---

7. No request was made by Respondent that judicial or administrative notice be taken regarding the 1979 strike or of any of the details thereof. Pursuant to Evidence Code section 452(j), notice is taken of the fact there was a UFW strike in the lettuce industry in the Salinas area in 1979. Notice is not taken of the particular growers struck, the time frame during which any grower in the area was struck, whether the grower was picketed, or the time frame when such picking occurred, or whether any particular grower operated with scabs.

8. Maximum Precision Metal Products Co., 236 NLRB No. 179; Wilco Energy Corp., 246 NLRB No. 138; Gaffe Giovanni, Inc. d/b/a/ Giovanni's, 239 NLRB No. 31; Leroy Fantasies Inc., and Hardwicke's Plum, Inc., a joint venture d/b/a/ Maxwell's Plum,256 NLRB No.36.

they in fact were full or had seniority workers who had not yet been called back. Thus, I find it doubtful that Perez failed to seek employment with lettuce growers during the 1979 season. Any uncertainty in the evidence on this point must be resolved against Respondent.[9] That portion of General Counsel's specification relating to 1979 will stand.

To summarize: Perez failed to seek work during the 1980 lettuce season; therefore backpay due him is reduced in the amount of $12,665.27. Perez also had interim earnings in the amount of $100.50 beyond the interim earnings set forth in the backpay specification.

Net earnings in backpay specification	$23,476.87
Less 1980 season	12,665.27
Subtotal	$10,811.60
Less additional 1978 interim earnings	100.50
Amount due Perez	$10,711.10

RECOMMENDED ORDER

Pursuant to Labor Code section 1160.3, the Agricultural Labor Relations Board (Board) hereby orders Respondent United Farm Workers of America (AFL-CIO) to pay Cervando Perez $10,711.10, plus interest at the rate of seven (7) percent per annum until the date of issuance of this Order, and thereafter interest to be computed in

---

9. Big Three Industrial Gas (1982) 263 NLRB 1189, 1197.

/

/

/

accordance with the Board's Decision and Order in <u>Lu-Ette Farms, Inc.</u> (1982) 8 ALRB No. 35.

Dated: November 28, 1984.

ROBERT LE PROHN
Administrative Law Judge